NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| MICHAEL SHERIDAN McKINNEY, | ) | No. 89-55869 |
| | ) | |
| Petitioner-Appellee, | ) | D. C. No. CV |
| | ) | 87-5448- |
| | ) | RJK (S) |
| vs. | ) | |
| | ) | MEMORANDUM*/ |
| ROBERT M. REES, | ) | |
| SUPERINTENDENT OF DEUEL | ) | |
| VOCATIONAL INSTITUTION, and | ) | |
| ATTORNEY GENERAL OF THE | ) | |
| STATE OF CALIFORNIA, | ) | |
| JOHN K. VAN DE KAMP, | ) | |
| | ) | |
| Respondents-Appellants. | ) | |
| | ) | |

Appeal from the United States
District Court for the Central
District of California
Robert L. Kelleher, District Judge,
Presiding Argued and Submitted
June 4, 1990

Before: BROWNING and PREGERSON, Circuit Judges, and ORRICK,**/
Senior District Judge

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*. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**. Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

Respondents-appellants, Robert M. Rees, Superintendent of Deuel Vocational Institution, and Attorney General of the State of California, John K. Van de Kamp ("State"), appeal the conditional grant of writ of habeas corpus entered by the United States District Court for the Central District of California in which the court found that petitioner-appellee, Michael Sheridan McKinney ("McKinney"), was denied his right to a fundamentally fair trial. We affirm.

I

McKinney was convicted by a jury in the Superior Court of Los Angeles, State of California, of the first degree murder of his adoptive mother. He appealed his conviction to the Court of Appeal, which affirmed his conviction. He failed to file a timely petition for review of his conviction in the California Supreme Court because his counsel miscalculated the dates and filed the petition for review one day late. McKinney then filed a petition for writ of habeas corpus in the

California Supreme Court, alleging ineffective assistance of counsel for failure to file a timely request for review that resulted in the loss of his opportunity to have that Court consider four arguments as to why his conviction should be reversed. The four arguments were specified in the petition for a writ of habeas corpus and a copy of his petition for review was attached as an appendix. The petition for a writ of habeas corpus was summarily denied by the California Supreme Court.

McKinney then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition was referred to a magistrate. The State filed its return to the order to show cause alleging failure to exhaust state remedies. The magistrate found that McKinney had exhausted his state remedies and issued an order requiring the State to file a supplemental return addressing the merits of the petition. The

State filed a supplemental return, the magistrate issued a preliminary report, and McKinney and the State filed timely objections. The State's objections were directed to the merits of the petition and did not address the exhaustion issue. After consideration of the objections, the magistrate issued a final report and recommendation ("report"). The district court filed an order adopting the report and entered a judgment that conditionally granted the writ of habeas corpus and ordered McKinney's release from custody unless charges were refiled against him within ninety days of the date of entry of judgment. The State then filed this appeal.

The district court granted the writ of habeas corpus because the use of character evidence to show that McKinney had the propensity to commit the crime for which he was charged resulted in a trial that was fundamentally unfair. This conclusion was based on the introduction at trial of the following evidence:

1. McKinney's mother was murdered at home in her bed by four cuts to her throat and chest with a knife and/or other sharp-edged instrument. The murder weapon was never recovered. There were no signs of forced entry to the victim's home. Present at the time of the victim's murder were her husband, Quentin McKinney, and her son, McKinney. There were no witnesses to the commission of the murder and no confession of guilt.

2. Evidence found at the McKinney home included the following: a pair of McKinney's camouflage pants and a towel stained with blood of the victim's type in the den; a tee shirt of Quentin McKinney's stained with blood of the victim's type in the bathtub; blood stains of the victim's type on the bathroom sink; a pair of ski gloves stained with blood of the vadium's type on a kitchen cabinet; and blood stains of the victim's type on three telephones.

3. Quentin McKinney was wearing a folding "Buck" knife when the police arrived at the

McKinney home. The day after the murder, Quentin McKinney presented the police with a second pair of McKinney's camouflage pants, which he stated he found in the closet with McKinney's other clothes in the bedroom where he (Quentin) had been sleeping on the night of the murder.

4. The prosecutor introduced into evidence a "Gerber" dagger and a "Tekna" dagger that were previously owned by McKinney. The Gerber dagger had been taken and kept in custody by a Los Angeles Police Officer four months before the murder. The Tekna dagger had been given to a friend approximately three months before the murder. The prosecution also introduced into evidence a new Tekna dagger that had been purchased by the prosecution for use at trial.

5. A witness testified that once or twice he had seen McKinney wear a knife strapped to McKinney's leg, and that he had observed McKinney carve the words "Death is His" on a closet door in his dorm room and then stick the knife in the wall

and leave it there. The witness then identified two color photographs of the 'Death is His' writing and the photographs were introduced into evidence. He testified that he had seen McKinney sharpen the knife on several occasions, and that during a power outage at school, McKinney had strapped his knife on, went out somewhere, and stayed out half the night.

6. The county deputy medical examiner testified that the victim suffered four wounds that were caused either by cutting or stabbing, that the wounds could have been inflicted by various types of knives, including a knife sharpened on both sides, a knife sharpened on one side with a thin dull side, a double edged dagger, a weapon with a sharp edge, or a pointed weapon with at least one sharp edge. He testified that two of the four wounds could have been caused by a class of knives such as the new Tekna knife purchased by the prosecution, and that the neck wounds that had caused the death could have been made by any

instrument with a sharp edge, including a razor blade. On cross-examination, he testified that the victim's wounds could have been inflicted by a Tekna, a Gerber, a folding Buck knife, a kitchen knife, or a knife that could be found in a typical home.

7. When McKinney was cross-examined, the prosecutor was permitted to question him about the knives he had previously owned and sold, whether he had a fascination with knives, liked knives, liked owning knives, liked to stop and look at knives in store window, liked to examine knives, often talked about knives, if knives were his hobby, and about why he had owned knives of certain types and colors at time periods before the murder. The prosecutor then asked McKinney whether he "was familiar with some of the various techniques that, for example, are used in combat or that are used by commando type soldiers. . . ." R.T. 751-52. McKinney testified that he once dressed up like a soldier for fun, with a Tekna knife on his arm, and went

to see the movie "Apocalypse Now." The prosecutor then established that McKinney purchased a knife that was "favored . . . by commando type people . . . ." (R.T. 751.)

8. In his argument to the jury, the prosecutor expressed the view that McKinney's history of knife ownership was one of three main areas of evidence that were relevant to prove McKinney's guilt. At another point, the prosecutor stated to the jury that the knives were one of two subjects in which they should be most interested. He argued that the victim was probably killed with a double-edged knife, although the evidence did not actually support this assertion, and related that "fact" to the knives that McKinney had owned and suggested that they could have been the murder weapon. The prosecutor referred frequently to McKinney's knives throughout his argument, and declared that McKinney had an "obsession with knives . . . [i]n particular, double edged daggers." R.T. 1080.

II

The issues before this court are whether (1) the State waived the argument that McKinney failed to exhaust his state remedies, (2) McKinney exhausted his state remedies, (3) McKinney was convicted on the basis of erroneously admitted character evidence, and (4) erroneous admission of character evidence was so significant it rendered McKinney's trial fundamentally unfair in violation of his federal constitutional right to due process.

A.

McKinney suggests that the State's failure to reassert an objection to the report on the basis of his failure to exhaust state remedies constituted a waiver of his right to raise that issue on appeal.

Exhaustion was raised in the State's first return, at the exclusion of all other defenses. The magistrate rejected the State's argument on exhaustion and ordered it to address the merits of the petition. After considering the parties

arguments on the merits, the magistrate issued his report. The report did not address the issue of exhaustion of state remedies. Failure to raise the exhaustion issue again in its objection to the report, which did not touch on this issue, cannot be viewed as consent to the finding of exhaustion or waiver of the right to raise the issue on appeal.

McKinney argues that in this circuit it is well settled that a party's failure to file objections to a magistrate's proposed finding of fact with the district court waives the opportunity to contest those findings on appeal. Greenhow v. Secretary of Health & Human Services, 863 F.2d 633, 635 (9th Cir. 1988); Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir. 1983).

In the context of this case, the question of whether McKinney exhausted his state remedies is essentially a legal question; the Court is not concerned with whether any petition was filed, but rather with whether the petition that was filed was

legally sufficient for purposes of exhaustion. Id. at 454. There is conflicting authority in this circuit over whether failure to raise objections to a magistrates conclusions of law constitutes waiver of those issues on appeal. Compare McCall v. Andrus, 628 F.2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981) (failure to object to legal conclusion is waiver) with Britt, 708 F.2d at 454 (failure to object to legal conclusion is not waiver). In Greenhow, 863 F.2d at 635, this court noted but did not reconcile the conflicting lines of authority on this issue because intracircuit conflict can only be resolved by the court en banc. Fed. R. App. P. 35(a); Tornay v. United States, 840 F.2d 1424, 1427 n. 3 (9th Cir. 1988). In Greenhow, this Court chose to follow the Britt rule because it had been followed in three Ninth Circuit opinions subsequent to Britt, and might reasonably have been relied upon by the parties as a correct statement of the law in the circuit.

We follow Britt rule in this instance for the same reason. The issue of whether McKinney exhausted his state remedies is a question of law. The State's right to appeal this issue is not waived by failure to object to the magistrate's conclusion that McKinney exhausted his state remedies.

B

The doctrine of exhaustion of state remedies requires McKinney to give the highest state court a "fair opportunity" to consider his federal claims. Picard v. Connor, 404 U.S. 270, 276 (1971). The petition is sufficient for exhaustion purposes if the petitioner describes the "operative facts and legal theory" upon which the federal claims are based. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Exhaustion requires "only that the substance of the federal claim be fairly presented" to the state court. Id. (citing Picard, 404 U.S. at 278.)

McKinney's petition for a writ of habeas

corpus presented to the California Supreme Court raised ineffective assistance of counsel for failure to file a timely petition for review in that court, which resulted in the los of McKinney's opportunity to present to that Court his arguments with respect to why his conviction should be overturned. The petition referred directly to four grounds on which he believed his conviction should be overturned and then attached his untimely petition for review as an appendix.

In Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986), this court ruled that the petitioner had fairly presented his claims to the California Supreme Court by including his earlier petition to the California Court of Appeal as an exhibit to his petition for writ of habeas corpus. Here, explicit reference to the four issues in the petition and inclusion of the petition for review as an appendix constituted "fair presentation" of the issues to the California Supreme Court.

The fact that the California Supreme Court

summarily denied the petition is no indication that the issues were not fairly presented to that Court. It is well settled in this circuit that a petitioner who files a habeas corpus petition that fairly presents the claims to the highest state court and receives a "postcard denial" has exhausted his or her state remedies. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975).

C.

Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole purpose is to show his disposition or propensity to commit the offense charged. Cal. Evid. Code § 1101. Section 1101(a) provides that "evidence of a person's character or a trait of his or her character (. . . or evidence of specific instances of . . . conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." As with Rule 404 of the Federal Rule of Evidence, character evidence may come in "when

relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . . ) other than his or her disposition to commit such a crime." § 1101(b).

The primary purpose of this rule, known historically as the "character rule," is to ensure that a jury will not convict a defendant of a current charge just because he has been a "bad person in the past. People v. Alcala, (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775. Improper use of character evidence can deny a defendant a fair trial. Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("[T]he state may not show defendant's prior trouble with the law . . . not . . . because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

Evidence of McKinney's prior ownership and

use of knives, and of his "fascination" with knives, was erroneously admitted to show that he acted in conformity with his character rather than to connect him to the crime with which he was charged. Although the prosecutor argued that the evidence of prior ownership and use of knives would be useful in connecting McKinney to the crime with which he was charged, none of the three knives introduced into evidence were in McKinney's possession at the time of the murder, and none were ever connected to the crime. Additionally, the medical examiner testified that the murder weapon might have been a kitchen knife, a folding buck knife as was possessed by McKinney's father, a double-edged dagger, or a single-edged knife. Similarly, the fact that McKinney carved the words "Death is His" on his dorm closet door only added to the impression that he had a predisposition for violence, but had no relevance to the crime with which he was charged. Finally, evidence that McKinney liked to dress up like a soldier and had

a fascination with "commando" activities is the type of evidence likely to stimulate an emotional reaction against McKinney. The prejudice to McKinney that resulted from the introduction of character evidence far outweighed the probative value of that evidence.

D.

The question of whether the erroneous admission of character evidence rose to the level of a constitutional violation depends on whether the questionable evidence was so prejudicial that it rendered McKinney's trial fundamentally unfair. McGuire v. Estelle, No. 87-2522, slip op. 4355, 4362 (9th Cir. May 4, 1990).

Had the prejudicial evidence not been admitted, the jury would have been left to weigh evidence that both McKinney and his father were home at the time of the murder, and that both possessed or had access to knives that could have caused the injuries to the victim. A pair of McKinney's blood-stained pants to which Quentin

McKinney may have had access on the night of the murder, Quentin's blood-stained tee shirt, and a pair of blood-stained ski gloves were found at the McKinney home after the murder.

The crucial question at McKinney's trial was who committed the murder. In order for evidence of a prior act to be admitted to show identity, it must have some tendency to prove the defendant's identity as the perpetrator of the charged offense. "[T]he [prior act and the charged offense]must have enough shared characteristics to raise a strong inference that they were committed by the same person . . . . It is not enough that the two acts contain common marks." People v. Riviera, 41 Cal.3d 388, 392 (1985) (en banc).

McKinney's past acts were not similar enough to the acts with which he was charged to be viewed as probative evidence on the issue of whether he committed the murder. The State suggests that the questionable evidence provided a logical link between the crime and the defendant"

"[T]his evidence had, at least, a logical tendency to prove that if petitioner was fascinated with knives, he committed the knife killing; if he lived a 'commando lifestyle', he was guilty of the 'commando killing' of his mother; and that if he scratched the words, 'Death is His' with a knife on his dormitory door, he had a knife that had not been accounted for in the intervening period of time, which includes the date of the knife murder. Given the presence of this logical nexus, it is difficult to conceive of how this trial could be judged to be fundamentally unfair." State's Brief at 42.

The problem with the State's analysis is that this is precisely the type of 'logical nexus' that the character rule is designed to prevent because juries will be inclined to overvalue the evidence. The questionable evidence in this case is prejudicial for the additional reason that it is likely that it stimulated an emotional reaction against McKinney.

Although there was circumstantial evidence of McKinney's guilty, it cannot be said that the erroneous introduction of prejudicial evidence in this case was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); McGuire, slip op. at 4367 ("Although there was evidence suggesting [petitioner's] guilt, this evidence was certainly not overwhelming"); Dudley v. Duckworth, 854 F.2d 967, 972 (9th Cir. 1988) (error not harmless even when evidence of petitioner's guilt was "impressive but not overwhelming").

Given the inherently prejudicial nature of the evidence, coupled with the improper emphasis placed on this evidence by the prosecutor, we conclude that McKinney's trial was fundamentally unfair.

AFFIRMED.